

FILED
Court of Appeals
Division II
State of Washington
10/14/2022 3:37 PM
No. 57008-4

(Consolidated with No. 57018-1)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In the Matter of Jack Clearman, A Vulnerable Adult,

Rebecca Clearman,

Respondent,

v.

Alice Jane Clearman and Peter Buck,

Appellants.

APPELLANTS' OPENING BRIEF

CORR CRONIN LLP

Jack M. Lovejoy,
WSBA No. 36962
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Phone: (206) 625-8600
jlovejoy@corrchronin.com

Attorneys for Peter Buck

KHBB LAW

Karen R. Bertram,
WSBA No. 22051
The Hoge Building, Suite 800
705 Second Avenue
Seattle, Washington 98104
Phone: (206) 382-4414
kbertram@khbbllaw.com

Attorneys for Alice Clearman

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	7
III. ISSUES ON APPEAL	7
IV. STATEMENT OF THE CASE	10
A. Before 2015, Jack and Rebecca Clearman’s children were geographically distant and Jack’s will treated them equally.	10
B. 2015-2021: After Jack’s wife died, his daughter Alice became his live-in full-time caregiver and no one questioned her care.....	11
C. Jack wished to live out his life at home.	12
D. August 2021: Peter Buck moved in with Alice and helped care for Jack.....	13
E. The older children investigated Peter but found nothing.	13
F. August 2021: The older children had an attorney prepare documents to give them immediate control of Jack’s house.	14
G. September 1: To procure Jack’s signature, Vikki and Joe isolated Jack and lied to Alice.....	15
H. September-October 2021: Rebecca reacted to a modest proposal for more in-home care by deciding to move Jack out of his home.....	16
I. October 2021: The older children misled Jack into thinking that he had run out of money for his care.	18
J. Jack resisted Rebecca’s plan to sell his house, so the older children increased the pressure on him.	19
K. In the wake of Vikki’s threat, Jack asked again to see the documents she and Joe had him sign.	21
L. Jack lost sleep over his supposed financial problems until Peter reassured him.	21
M. Early November: Jack asked Alice and Peter for help finding an attorney; Alice and Peter did not “take him to a new attorney.”	22
N. November 2021: Jack worked with Ms. Kelly alone—Alice and Peter did not “change Jack’s will.”	23
O. The documents prepared by Ms. Kelly were shared with the older children and were focused on maintaining Jack in his home.....	24

P.	Jack’s decision to leave his house to Alice followed from six years of care by Alice.	25
Q.	After Vikki confronted Jack, the older children quickly began work on a guardianship petition to secure Jack’s assets and invalidate any new estate documents.	26
R.	November 24, 2021: Adult Protective Services received and investigated a report of undue influence and found no such thing.	27
S.	December 1-5: Jack was failing to thrive, so Alice explored several different forms of care and medical attention.	27
T.	December 1-5: No one who interacted with Jack, including Rebecca and Joe, urged immediate medical care.	29
U.	December 1-5: The older children repeatedly expressed satisfaction with Alice and Peter’s care for Jack.	32
V.	December 5, 2021: Hours after Joe stormed into the house yelling, Jack became shaky and Alice had him taken to the hospital. ..	33
W.	December 6: Rebecca Knew Jack was in the hospital but told the Court he would not receive medical attention unless a TRO was entered.	35
X.	December 6: Rebecca falsely told the court that Alice and Peter had blocked EMTs from seeing Jack.	35
Y.	Rebecca did not provide notice of the TRO to Jack or his attorney and objected to his attorney’s appearance in the VAPO action.	37
Z.	Jack suffered unconscionable consequences as a result of the older children’s zeal to invalidate his will.	38
AA.	After separating Alice from Jack, the older children continued to use the TRO to keep her out of her home and threaten her cats.	39
BB.	The older children vandalized and neglected the house in Alice’s absence.	41
CC.	The older children continued to pursue this case and the VAPO court continued to enter rulings after the case was moot.	42
V.	ARGUMENT	43
A.	Standards of review.	43
1.	The issue of mootness is reviewed <i>de novo</i>	43

2.	VAPO orders are reviewed for abuse of discretion—it is an abuse of discretion to apply an incorrect legal standard or make a ruling which does not meet the correct evidentiary requirements. ...	44
3.	Where the burden of proof is clear, cogent, and convincing evidence, the appellate court must review the findings for substantial evidence in light of the “highly probable” test.	45
4.	Undue influence is a mixed question of law and fact—factual findings are reviewed for substantial evidence, legal conclusions are reviewed <i>de novo</i>	47
B.	The VAPO court erred by entering orders in this case on January 7 and April 26 because the case was moot.	48
1.	It is error for the superior court to rule on a case that is moot.	48
2.	It was error for the court to rule on this case on January 7 and thereafter because there was no prospect of any effective relief.	51
3.	Jurisdiction over VAPO petitions does not automatically continue after death, but continues only as to limited circumstances and persons, which are not present here.	56
C.	Undue influence is tantamount to force or fear that destroys free will.	59
D.	The Court erred in concluding that Alice and Peter exercised undue influence.	63
1.	The predicate findings for the VAPO court’s determination of undue influence are not supported by clear, cogent, and convincing evidence.	63
2.	The actual facts do not support a conclusion of undue influence.	70
E.	The VAPO court erred in concluding that Alice and Peter committed neglect.	72
1.	A finding of neglect requires clear, cogent, and convincing evidence of a duty, a “serious disregard of consequences” and a “clear and present danger.”	72
2.	Neglect requires misconduct worse than negligence.	73
3.	The Court had no legal basis for its conclusion that Alice and Peter owed Jack a duty.	76
4.	A finding of “clear and present danger” cannot be based on hindsight.	78

5.	There is no evidence of a “serious disregard” for Jack’s well-being.	80
6.	Without hindsight, no evidence suggests a clear and present danger.....	81
7.	Alice did follow through with requests to have a medical assessment.....	85
8.	EMTs did see Jack and noted that he had no complaints.	87
9.	Scheduling a hospice evaluation was not neglect.....	89
F.	The Trial Court’s Attorney Fees and Costs Award is Unsupported by Law.	89
G.	This Court should award attorney fees to Alice and Peter.	91
VI.	CONCLUSION.....	91

TABLE OF AUTHORITIES

Cases

<i>Adkisson v. City of Seattle</i> , 42 Wn.2d 676, 685, 258 P.2d 461 (1953)....	74
<i>Brown v. DSHS</i> , 190 Wn.App. 572, 590, 360 P.3d 875 (2015).....	74
<i>Citizens for Financially Responsible Gov't v. City of Spokane</i> , 99 Wn.2d 339, 350, 662 P.2d 845 (1983).....	49
<i>Cummings v. Guardianship Servs. of Seattle</i> , 128 Wn. App. 742, 749, 110 P.3d 796 (2005).....	51
<i>Dalton M., LLC v. North Cascade Trustee Services</i> , 20 Wn.App.2d 914, 504 P.3d 834 (2022).....	91
<i>Gander v. Yeager</i> , 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).....	90
<i>Harbor Lands LP v. City of Blaine</i> , 146 Wn.App. 589, 595, 191 P.3d 1282 (2008).....	passim
<i>Hilltop Terrace Homeowner's Ass'n v. Island County</i> , 126 Wn.2d 22, 29, 891 P.2d 29 (1995).....	44
<i>In re Estate of Hansen</i> , 66 Wn.2d 166, 172, 401 P.2d 866 (1965).....	48
<i>In re Estate of Haviland</i> , 162 Wn.App. 548, 555-556, 255 P.3d 854 (2011)	71
<i>In re Estate of Lint</i> , 135 Wn.2d 518, 535, 957 P.2d 755 (1998).....	60, 72
<i>In re Estate of Marks</i> , 91 Wn.App. 325, 333, 957 P.2d 235, <i>review denied</i> , 136 Wn.2d 1031, 972 P.2d 466 (1998)	60
<i>In re Estate of Riley</i> , 78 Wn.2d 623, 640, 479 P.2d 1 (1970).....	46, 57
<i>In re Estate of Smith</i> , 68 Wn.2d 145, 157, 411 P.2d 879, <i>corrected by</i> 416 P.2d 124 (1966).....	48
<i>In re Knight</i> , 178 Wn.App. 929, 937, 317 P.3d 1068 (2014)	45, 51
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) .	44, 45
<i>In re Melter</i> , 167 Wn.App. 285, 300–01, 273 P.3d 991, 999–1000 (2012)	47, 60, 61, 72
<i>In re Riley's Estate</i> , 78 Wn.2d 623, 646, 479 P.2d 1 (1970)	60
<i>In re Sego</i> , 82 Wn.2d 736, 739, 513 P.2d 831 (1973)	46
<i>Kitsap Bank v. Denley</i> , 177 Wn.App. 559, 569, 312 P.3d 711 (2013)	46
<i>Matter of Bosone</i> , 8 Wn. App. 2d 1003 (2019)	51
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 253, 692 P.2d 793 (1984) 48, 49	
<i>Raven v. DSHS</i> , 177 Wn.2d 804, 306 P.3d 920 (2013)	13, 74, 75, 76
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 448, 128 P.3d 574 (2006).....	76
<i>Wa. State Phys. Ins. Exch. & Ass'n v. Fisons, et al</i> , 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).....	45
<i>Washington State Commc'n Access Project v. Regal Cinemas, Inc.</i> , 173 Wn.App. 174, 203–04, 293 P.3d 413 (2013).....	44

<i>Winter v. Dep’t of Soc. and Health Servs. on behalf of Winter</i> , 12 Wn.App.2d 815, 838, 460 P.3d 667 (2020)	44
<i>Woldemichael v. DSHS</i> , 19 Wn.App.2d 178, 182, 494 P.3d 1100 (2021)	74
<i>Wolstein v. Yorkshire Ins. Co. Ltd.</i> , 97 Wn.App. 201, 206, 985 P.2d 400 (1999)	44
Statutes	
RCW 11.92.190	76
RCW 26.44	74
RCW 74.34.020(16)	72
RCW 74.34.020(2)	72
RCW 74.34.020(2)(d)	47
RCW 74.34.110(1)	52
RCW 74.34.110(2)	47
RCW 74.34.130(7)	90
RCW 74.34.130.	52

I. INTRODUCTION

In 2021, Jack Clearman was 100 years old. For six years, his youngest daughter, Alice, had lived with him and cared for him around the clock. Fearing that Jack might will to Alice the house he shared with her, his other children, Rebecca and Joe, and Joe's wife Vikki, took steps to prevent that from happening.¹ In August 2021, they had an attorney prepare documents that would put Jack's home immediately into a trust controlled by Vikki. Vikki and Joe then took Jack out of his home, away from Alice, and had him sign the documents, which he had never seen or discussed before.

When Alice and her life partner, Peter Buck, proposed hiring some more part-time in-home help for Jack (with Peter offering to help pay for it), Rebecca told Jack, Alice, and Peter

¹ Several people referenced herein share a last name, so only first names will be used. Jack Clearman's late wife, Rebecca P. Clearman, will be called "Jack's wife" to avoid confusing her with their daughter Rebecca R. Clearman. Rebecca, Joe, and Joe's wife Vikki, are at times referred to as "the older children." No disrespect is intended by any of these naming conventions.

that Jack did not have the money for more care and did not have the money to stay in his home. She said “we must have a new long term plan,” proposed selling Jack’s home to raise funds, said Jack would do well in an institution, and announced “this is my decision to make.” Jack was upset by Rebecca’s “new plan” and asked to see copies of his estate planning documents so he would know who had authority to make decisions for him.

After hearing about Jack’s request for legal documents, Joe and Vikki again took Jack out of his home. Jack told Vikki on that occasion that he intended to leave his house to Alice. Vikki responded that she would never speak to him again if he did that. Within days, the older children hired an attorney to file a guardianship action to ensure Jack could not give the house to Alice.

After being confronted and threatened by Vikki, Jack hired a new lawyer, Janean Kelly. Ms. Kelly found out and told Jack that on September 1, he had signed a deed giving Vikki

control of his house. At Jack's request, Ms. Kelly prepared new powers of attorney, an amendment to the trust making Jack trustee, and a new will. Alice and Peter had no input on any of these documents, which left Jack's house to Alice and the rest of his estate equally to all three children.

While the older children were preparing the guardianship petition, Jack developed a sore shoulder that decreased his mobility and made him weaker. Jack began mentioning death. On December 1, at the suggestion of Jack's part-time professional in-home caregiver, Peter informed the older children that Jack was in a decline and they should see him in case this was their last chance. At least a dozen people saw Jack in person or by Zoom on December 1-5 and no one, after seeing him, suggested that he needed immediate medical attention. On December 4, Rebecca suggested that Jack be seen by a doctor on Monday, December 6. Alice already had an appointment scheduled for that day, which Rebecca said was "Wonderful."

Alice also scheduled appointments with a physical therapist and occupational therapist.

The one time someone proposed immediate medical attention was the afternoon of December 5, when Vikki, who had not seen Jack that day, called 911 after having a text message exchange with Alice about whether or not Jack could be safely transported to the toilet. EMTs arrived and cited no patient complaint or need for transport. Joe, who arrived with the EMTs, then took Jack to the toilet and noted that Jack was doing much better. Rebecca saw Jack by Zoom a few hours later and did not suggest any immediate medical attention. Later that day, Jack started shaking, so Alice had him taken to the hospital.

On December 6, Rebecca, supported by a declaration from Joe, filed a petition for a Vulnerable Adult Protection Act Order (“VAPO”). Rebecca knew that Jack was, at that very time, in the hospital thanks to Alice. But she told the court that Alice and Peter had changed Jack’s estate plan and were now

denying him medical care so he would die. She said the only way Jack would be seen by a doctor was if Alice and Peter were ejected from his home and kept 500 feet away from him. The resulting temporary restraining order (“TRO”) was served on Alice when she returned to the hospital after taking a break on December 6. She and Jack were never able to see her each other again or say goodbye. Jack died on December 9.

After Jack died, Alice’s siblings refused to dismiss the VAPO proceeding and pressed for entry of a final order. They claimed they needed an order to prevent Alice and Peter from handling Jack’s assets. At the January 7 hearing, the court was aware that a probate of Jack’s estate had already begun and that Alice and Peter had requested that they *not* be the personal representative. Despite the VAPO proceeding being entirely moot, the court entered a final order finding that Alice and Peter had engaged in “personal exploitation” of Jack by exerting “undue influence” by “deceiving” Jack about Vikki and Rebecca’s intention to sell his house and put him into an

institution and that they did so to get Jack to change his estate plan. While this was consistent with Rebecca's unsubstantiated allegations, there was no evidence that Alice or Peter ever suggested any change to Jack's estate plan, or ever told Jack anything about selling his home that Rebecca did not tell Jack herself and write in an email Jack saw for himself.

The court also found that Alice and Peter engaged in "neglect" by "failing to obtain health care for Jack when he appeared ill" and "preventing emergency medical staff from examining Jack." These findings are unsupported by the evidence. When Vikki called 911, the EMTs talked to Jack directly. And Alice sent Jack to the hospital that same day. There were never any complaints about Alice's care until the older children had guardianship and VAPO petitions drafted. And there was no point during the days between Jack's shoulder injury and the evening of December 5 when anyone who saw Jack believed he needed immediate medical attention.

Alice and Peter appeal the January 7 VAPO orders and the associated April 26 findings and conclusions because the VAPO proceeding was moot as of January 7, the findings are not supported by clear, cogent, and convincing evidence, and the conclusions are contrary to the evidence.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing the VAPO petition as moot on January 7, 2022.
2. The trial court erred in making its oral findings on January 7 and in entering Findings of Fact (“FOF”) 5, 8, 10, 11, 12, 14, 15, 16, 19, 21, 26, 27, 30, 31, and 34 on April 26, 2022.
3. The trial court erred in entering the January 7 and April 26, 2022, VAPO orders and April 26, 2022, judgment against Alice and Peter.
4. The trial court erred in entering an award and judgment for \$13,386.15 in attorney fees and costs and against Alice and Peter.

III. ISSUES ON APPEAL

1. The VAPO petition’s purpose was to prevent Alice and Peter from harming Jack and mishandling his assets. As of January 7, Jack was deceased, and Alice and Peter had no prospect of accessing his assets. Did the court err by failing to dismiss the VAPO petition as moot? AE #1.

2. Must the trial court be reversed because its oral findings and FOF 5, 8, 10, 11, 12, 14 15, 16, 19, 21, 26, 27, 30, 31, and 34 are not supported by clear, cogent, and convincing evidence? AE #2.
3. FOF 5, 8, 10, 11, 12, 15, 16, 21, and 30 all purport to make findings about what particular documents say. Each of the findings misstates the content of the relevant document. Did the court err in entering those findings? AE #2.
4. FOF 14 says that Alice and Peter “had Jack transfer \$46,000 out of the account managed by Vikki for Jack’s bills and deposited those funds into a joint account Jack created with Alice Clearman.” There is no evidence Alice or Peter “had Jack” do anything, nor that they deposited any funds. Did the court err in entering FOF 14? AE #2.
5. FOF 19 says Alice and Peter “took Jack to a new attorney, Janean Kelly.” There is no evidence Alice and Peter took Jack anywhere and Ms. Kelly testified she came to Jack. Did the court err in entering FOF 19? AE #2.
6. FOF 26 says “neither Alice nor Peter followed through with the requests from the family to get a medical assessment or call for emergency services.” The record shows that the family knew of Jack’s scheduled December 6 appointment and did not request an earlier appointment. The record also shows that Alice called for emergency services on December 5. Did the court err in entering FOF 26? AE#2.
7. FOF 27 says Alice refused to allow emergency medical personnel to see Jack on December 5. The contemporaneous report by the EMTs says they

evaluated Jack. Did the court err in entering FOF 27? AE#2.

8. The court found at VRP 50 that there was no evidence anyone but Alice and Peter told Jack that Rebecca and Vikki intended to sell Jack's home and move him to an institution. But there is evidence that Vikki and Rebecca told him of their plans themselves. Did the court err in making a finding that was not supported by clear, cogent, and convincing evidence? AE#2.
9. The court found at VRP 51 that Jack's decision to change accountants must have been the result of exploitation because the court could not think of any other reason for the change. Did the court err by presuming personal exploitation in the absence of clear, cogent, and convincing evidence? AE#2.
10. The court found at VRP 52:24 that Jack's urinary tract infection ("UTI") could have been prevented and concluded in Conclusion of Law ("COL") 6 that Jack's UTI likely would have been treatable with earlier treatment. There is no evidence to support that finding and conclusion. Did the court err and must its ruling be vacated? AE#2-3.
11. There is no evidence of Alice or Peter ever asking for or mentioning a change to Jack's estate plan, but the trial court concluded in COL 3-4 that Alice and Peter unduly influenced Jack to change his estate plan. Did the court err, and must its ruling be vacated? AE#3.
12. The Court concluded in COL 6-7 that Alice and Peter committed neglect through a serious disregard of a clear and present danger to Jack's health. There is no evidence that, at any point before Alice called 911 on December 5, anyone who saw Jack believed he needed immediate

medical care. Did the court err and must its ruling be vacated? AE#3.

13. Did the Court err in awarding attorney fees against Alice and Peter where no VAPO order should have been entered and the award rewards the older children's misconduct during and following the VAPO proceedings? AE#4.

14. Should Alice and Peter be awarded their attorney fees on appeal for the bad faith conduct of Respondent in bringing and maintaining the VAPO petition?

IV. STATEMENT OF THE CASE

A. Before 2015, Jack and Rebecca Clearman's children were geographically distant and Jack's will treated them equally.

Jack and his wife had three children: Rebecca, Joe, and Alice. As adults, Rebecca lived in Texas, Joe lived in Washington, and Alice lived in California, while Jack and his wife lived in Georgia. CP0002, 0304, 0310, 0372. Jack and his wife were generous with each of their children. C0023. In 2007, when Jack and his wife were still healthy with many years ahead of them, Jack wrote a will leaving everything to his wife and, if she predeceased him, to his children in equal shares.

CP0116-119.² In 2003, after Jack and his wife retired, they built a home together in Poulsbo with the intention of living out their days there. CP0305, 0344, 0349, 0372, 0498.

B. 2015-2021: After Jack's wife died, his daughter Alice became his live-in full-time caregiver and no one questioned her care.

On December 23, 2015, Jack's wife died in their home. CP0344. That same day, their youngest daughter Alice left her home, abandoned her life in California, flew to Poulsbo, and began providing round-the-clock in-home care for Jack. CP0304. Alice did this without remuneration even though she had to retire when she moved. *Id.* The other children never spent a night with Jack. *Id.* Alice and Jack shared a home for the next six years. *Id.*

Alice provided superb care to Jack. CP0344, 0349, 0353. There is no record of anything but praise for Alice's care until

² FOF 5 and 8, are incorrect to the extent they ignore the fact that Jack's 2007 will leaves his estate to his wife, and only to his children in the alternative.

the older children had guardianship and VAPO petitions in the works in December 2021.

C. Jack wished to live out his life at home.

Jack's affection for his house was well known. Rhonda Stillwell, his friend of 30 years, declared: "His wish was to die in his own home as his wife did. He did not want to die in a hospital or a nursing home." CP0344. Mary Mouwdy, Jack's part-time professional in-home caregiver, agreed: "If he were put into a nursing home, he would not have those everyday reminders of the love of his life and treasures of a lifetime." CP0351. Jack told Ms. Mouwdy "On several occasions...he did not want to go to a nursing facility of any kind, and that he wished to stay in his own home until his death." CP0349. With his attorney, Ms. Kelly, "He was adamant that he did not want to be taken out of his home to a hospital or group facility." CP0144; see also Appx. 035-042(Jack's desire to stay at home). The Washington state legislature and courts enforce a strong public policy of refusing

to permit elders or incompetent persons to be placed in facilities against their will absent involuntary commitment. *See e.g. Raven v. DSHS*, 177 Wn.2d 804, 306 P.3d 920 (2013), discussed *infra*.

D. August 2021: Peter Buck moved in with Alice and helped care for Jack.

In 2021, Peter Buck began a relationship with Alice. CP0371 ¶ 3. In August 2021, Peter moved in with Alice, who was constantly at home caring for Jack. *Id.* ¶¶ 3, 5. Peter is a trained hospice volunteer who had previously taken sabbaticals to care for relatives at the end of their lives. *Id.* ¶ 4. Peter immediately began helping with Jack’s care and the two of them became fast friends. *Id.* ¶ 5-6.

E. The older children investigated Peter but found nothing.

Vikki testified that she suspected Alice had “purposely chosen” Peter as her life partner because he, as an attorney,

could help her take control of Jack's house. CP0539 ¶ 13.³

Rebecca shared Vikki's suspicion of Peter and, using Jack's funds, hired an attorney to investigate him in August. CP0532, 0539 ¶ 15; see Appx. 024-028 (Peter's offers to help Jack). The investigation did not lead to any information Rebecca decided to use in the court below.

F. August 2021: The older children had an attorney prepare documents to give them immediate control of Jack's house.

In August 2021, the older children hired attorney David Roberts. CP0539. Although he was purportedly hired to represent Jack, there is no evidence that he ever took direction from Jack. While Rebecca had a limited power of attorney to make medical decisions for Jack if needed, and while Vikki had a limited power of attorney that allowed her to pay Jack's bills, Vikki's power of attorney provided that Jack kept "the right to

³ There is no evidence or allegation in the record that Alice ever asked Jack to leave her the house or ever raised the subject of the house with Rebecca, Joe, or Vikki.

make financial decisions for myself as long as I am capable.” CP0122. Without consulting Jack, at the older children’s direction, Mr. Roberts prepared estate planning documents for Jack. CP0140. Among those documents was a September 1, 2021, “Revocable Living Trust” naming Vikki as initial trustee. CP0319. Mr. Roberts also had Jack quitclaim his house to the trust. CP0354.

G. September 1: To procure Jack’s signature, Vikki and Joe isolated Jack and lied to Alice.

On September 1, Joe came by Jack’s house and told Alice and Peter he was going to take Jack “to find a cheaper place to buy chewing tobacco” and would be gone for a while. CP0498. Joe and Vikki, then took Jack, who was wheelchair-bound, to Kingston where he was met by Mr. Roberts, who presented him with documents to sign. CP0325 (notary stamp by Roberts). Jack returned from his outing with Joe and Vikki out of sorts. CP0307, 0335. Two days after taking Jack out to “buy tobacco,” a new title was issued for Jack’s GMC sport

utility vehicle, which had been Alice's primary vehicle—it showed Joe as the new owner. CP0480, 0531.

H. September-October 2021: Rebecca reacted to a modest proposal for more in-home care by deciding to move Jack out of his home.

Before living with Alice and Jack, Peter had been the primary caregiver for two of his older relatives and an experienced hospice volunteer for four years. CP0371.

When Peter moved in, Ms. Mouwdy was helping with Jack's care for four hours, three or four times a week. CP0348. Aside from that, Alice was Jack's sole caregiver.

In emails to the older children on September 22 and October 1, Peter suggested that the family consider allowing Alice three ten-hour breaks and one 38-hour break per month to improve her quality of life and thus improve Jack's care. CP0027-0029. Peter investigated local home-care agencies and had a meeting with a representative of Visiting Angels at the home on September 30. CP0029. Peter also offered to help pay for the additional care if need be. CP0027.

An increase in Jack's expenses would have reduced the children's inheritances. Within days of Peter's October 1 email, Rebecca flew in from Houston. CP0559. She told Peter and Alice she had come to sell the house and move Jack into a facility. CP0564. She confirmed this in an email to Alice and Peter on October 4, 2021, which said:

Our parent's generosity with their children is the reason Dad no longer has funds to pay for in home care.

...

We must have a new long term plan.

...

Dad will do extremely well in an environment with lots more people and activity.

...

It will be an adjustment for everyone; thankfully people adjust to changes, even unwanted ones.

...

legally and morally- this is my decision to make.

CP0028. Her email did not invite any discussion. Although Peter had proposed limited night-time care and 68 hours of respite care per month at \$36 to \$38 per hour and had offered to help pay (CP0027, 0032), Rebecca characterized his proposal as

costing Jack \$13,000+ per month. CP0028. No additional help was hired and Alice continued providing constant care to Jack.

I. October 2021: The older children misled Jack into thinking that he had run out of money for his care.

On October 5, Rebecca told Jack that he had run out of money, that she was going to sell the house, and that she was going to move him to a home. CP0499. He was in tears and devastated. *Id.*

Rebecca's alarmism is at odds with the guardianship petition she filed on December 5. It says Jack had assets of \$1,646,000, including \$280,000 in liquid investments, and \$2,300 per month from Social Security. CP0009. Additionally, he had income from a pension and a farm agency. CP0500. He had no debt. *Id.* His income matched his expenses. *Id.* He had free full-time live-in care from Alice and Peter.

Despite these facts, Rebecca declared that if he needed more care, "Selling the house makes the most financial sense." CP0032. Rebecca did not explain how selling Jack's home would have made sense from Jack's point of view given that

Jack wanted to stay at home. Selling Jack's home, in what was still a white-hot housing market, would have made the most financial sense for Rebecca, who stood to inherit a third of the residuary of his estate, but would inherit none of the house's value if, as the older children feared, Jack left it to Alice.

J. Jack resisted Rebecca's plan to sell his house, so the older children increased the pressure on him.

After Rebecca told Jack about moving to a facility in early October, Jack reflected: "I will die if she does that." CP0499. Jack resisted Rebecca and she did not sell his house or move him out. CP0373.

After ruminating on the possibility of being moved, Jack had Alice send Vikki an email on October 27, asking that Vikki "bring him copies of any and all legal documents he has signed since Mom died so he knows who has legal powers of his person and his estate and what those powers are." CP0031.

Vikki did not respond to that request. CP0564. But later that day, Vikki and Joe again got Jack in a car. CP0306, 0500. This time Joe said he wanted to take Jack for a flu shot.

CP0306. Upon returning home, Jack reported that Joe had taken him to be confronted by Vikki. CP0306. Vikki adopted a classic tool of undue influence—withdrawal of affection. As she admitted in her declaration, when Jack mentioned his intent to give his house to Alice:

I told Jack that I would never speak to him again if he did this.

CP0540. Jack returned from that confrontation visibly shaken, hurt and confused. CP0306.

Vikki carried through on her threat—she stopped speaking to Jack and Joe’s visits decreased. CP0306, 0564. After being confronted by Vikki, Jack talked at length about how disappointed he was, how he thought Vikki would understand the fairness of what he was doing, how his wife would be ashamed if she were alive, and how he could not believe Joe was going along with Vikki. CP0501. After threatening Jack, Vikki visited Kitsap Bank on November 3 to report that Jack had given his house to Alice (which had not

happened). CP0230 ¶ 7. Vikki's report contributed to the Bank's decision to contact Adult Protective Services. *Id.* ¶ 10.

K. In the wake of Vikki's threat, Jack asked again to see the documents she and Joe had him sign.

Jack's inability to get copies of his documents and the threat that Vikki (who usually paid his bills) would never speak to him again, increased his concerns over money. CP0035. Jack hired an attorney, William Broughton, and had both the attorney and Alice reach out to Mr. Roberts directly for copies of Jack's documents. CP0042, 0140. Mr. Roberts never provided any documents or any response to Alice's request that he identify who his clients were and produce their conflict waivers. *Id.*

L. Jack lost sleep over his supposed financial problems until Peter reassured him.

Rebecca and Vikki's statements that Jack was running out of money caused him to have trouble sleeping. CP0305-0306. To put Jack at ease, Peter set up an account at Vanguard, deposited \$500,000, and told Jack that the account would be

used to cover his expenses if he ran out of money. CP0306.

Jack was delighted, said "now I can sleep," and enjoyed reviewing the account's performance with Peter. CP0305-0306.

M. Early November: Jack asked Alice and Peter for help finding an attorney; Alice and Peter did not "take him to a new attorney."

In their VAPO pleadings, the older children repeatedly said Alice and Peter "took to Jack to an attorney" to procure new estate planning documents. CP0002, 0010-11, 0183, 0395. This claim was adopted as a finding by the court. CP0804.

The truth was that when Jack asked for a new attorney, Peter asked one of Jack's friends from church to visit the house and recommend an attorney to Jack. CP0502. The recommended attorney was too busy, so Peter put a request out on a WSBA listserv. *Id.* The first attorney to respond was Janean Kelly, who did not know Alice, Jack, or Peter. *Id.* Peter mentioned her to Jack on November 5 and Jack asked to have her visit. *Id.* The next day, she visited Jack at his home. CP0352-0353, 502.

**N. November 2021: Jack worked with Ms. Kelly alone—
Alice and Peter did not “change Jack’s will.”**

In the VAPO action, the older children repeatedly speculated that Alice and Peter “changed Jack’s will.” CP0002, 0010-12, 0019-0020, 0022. But Ms. Kelly’s declaration explains that she visited Jack’s home four times and met with him privately each time. CP0352-0355. Ms. Kelly is the one who revealed to Jack on November 7 that he had entered into a “Revocable Living Trust;” that Vikki was the trustee; that it was unusual for someone besides the settlor to be the initial trustee of a revocable living trust; and that Jack had quitclaimed his house into Vikki’s control. CP0144. This news from Ms. Kelly caused Jack to be “dismayed.” *Id.* Jack reported to Ms. Kelly that he had signed documents presented by Joe and Vikki because he trusted them and he did not know he had signed away control of his property. *Id.*

Throughout her discussions with Jack, Ms. Kelly found him “lucid,” he “understood his options” and she “saw no evidence of undue influence.” CP0354.

He was very clear that he wanted Alice to handle his affairs. He was adamant that he did not want to be taken out of his home to a hospital or group facility. This is reflected in the documents he prepared in many places.

Id. There is no evidence of Alice or Peter discussing Jack's will with Jack or with Ms. Kelly.

O. The documents prepared by Ms. Kelly were shared with the older children and were focused on maintaining Jack in his home.

On November 7, Jack wrote to Rebecca and Vikki and advised them that he planned to have new powers of attorney prepared "that will not allow my residence to be sold and will require that I reside there until my death, unless it is absolutely not feasible." CP0069-0070.

Jack's estate planning documents, all of which were sent to the older children on November 9, were explicit that he wanted to remain at home. CP0041, 0068-0115. For instance, his General Durable Power of Attorney prohibited a sale of his home without his consent. CP0084. If Jack could not consent, his agent was to obtain an order from a court showing financial necessity before his residence was

sold. *Id.* Jack's Health Care Power of Attorney had a similar provision, specifying that he was willing to pay for 24-hour care. CP0107.

P. Jack's decision to leave his house to Alice followed from six years of care by Alice.

Aside from speculation in the older children's declarations, nothing in the record suggests Jack was pressured to will his house to Alice. There is no evidence that Alice asked for the house. Testimony from both Ms. Kelly and Vikki says Jack brought up the idea of giving Alice the house on his own. CP0034, 0354. Jack also explained his reasoning to Ms. Kelly: "Jack raved about the care his daughter, Alice, provided for him, and he wanted to keep the living situation as it was" and "He was very clear that he wanted his daughter, Alice, to inherit the residence where she cared for him for all those years, and the contents therein." CP0353-0354. This was consistent with Jack's statements to others. Ms. Stillwell testified: "Uncle Jack was very grateful for both Alice and Peter taking care of him at home where he chose to live the rest of his life." CP0344. Ms.

Mouwdy testified: “He expressed his appreciation for Alice on several occasions...Whenever he asked her to do anything for him, she always took care of it quickly, willingly, and lovingly.” CP0349.

Q. After Vikki confronted Jack, the older children quickly began work on a guardianship petition to secure Jack’s assets and invalidate any new estate documents.

On November 7, the day Jack advised the older children that he was revoking their powers of attorney, Rebecca’s attorney, Sarah McCulloch, began work on a guardianship petition. CP0437. Within days, she had a declaration from Jack’s old accountant, who did not testify to any recent discussions with Jack, but gave an opinion on what he thought Jack would do in his will. CP0016. The grounds for the guardianship petition had nothing to do with healthcare. The petition was all about Jack’s assets and estate planning, and attacking Alice’s fitness to be a fiduciary. CP0008-0013.

R. November 24, 2021: Adult Protective Services received and investigated a report of undue influence and found no such thing.

On November 24, an investigator from Adult Protective Services showed up at Jack's home to investigate a report against Alice. CP0311. During the investigation, Jack praised the care he received from Alice as the reason he was able to stay in his home and expressed his desire to continue to make his own decisions about his money and property. *Id.* The APS investigation produced nothing that the older children saw fit to add to the record in this case.

S. December 1-5: Jack was failing to thrive, so Alice explored several different forms of care and medical attention.

Jack hurt his shoulder in late November, which decreased his mobility, leading to lower energy. CP0349-0350. He was not using his walker and his appetite decreased. *Id.* Alice arranged for him to have a hospital bed that would be easier to get in and out of; set a meeting with a home care manager for December 7; made an appointment with another home care

agency later that week;⁴ scheduled Jack for physical therapy and occupational therapy; and reached out to his physician, Dr. Mendelsohn, for an evaluation of what was happening with his shoulders and to discuss whether a diagnosis of possible death within six months was warranted, which could lead to hospice support. *Id.*; CP0309. As Dr. Mendelsohn explained, when a person is in the last six months of their life expectancy, a hospice referral is appropriate. CP0231. When Alice reported Jack's circumstances, Dr. Mendelsohn's staff scheduled a hospice consult to take place a few days later. *Id.*⁵

Dr. Mendelsohn did not testify that Alice insisted on hospice care, nor that a hospice consult was a bad idea. He

⁴ At this same time, Peter also continued to try to find more in-home care for Jack. CP0188.

⁵ The VAPO court found that Mendelsohn testified that "Alice did not seek any medical care for Jack between December 1 and December 5, 2021." CP0806, FOF 30. This finding implies that a hospice evaluation is *not* medical care. This finding disagrees with Dr. Mendelsohn's testimony, which says Alice did not seek any "other" medical care from his office. CP0232.

testified that he wanted the hospice consult to happen because a 100-year-old who is not thriving can deteriorate quickly.

CP0232. Dr. Mendelsohn also did not testify that Jack required immediate medical treatment.

T. December 1-5: No one who interacted with Jack, including Rebecca and Joe, urged immediate medical care.

When Jack began losing strength, Ms. Mouwdy suggested that Alice and Peter tell others that Jack was weakening and they should visit. CP0309. So, Peter sent a December 1 email to the older children inviting them. CP0044. The VAPO court found that Rebecca responded “that Alice should take Jack to the doctor.” CP0804, FOF 21. In fact, Rebecca said she assumed Alice would take Jack to the doctor the next day “if he’s still sleepy/droopy.” CP0045.⁶ But the next day, Jack was “a lot better” and not sleepy, and Rebecca asked that his hospice evaluation be cancelled. CP0186.

⁶ The various emails and texts between siblings are collected in order at Appx. 068-128.

On December 3 Alice texted her siblings, suggesting they visit “and perhaps try to heal wounds.” CP0167. On December 3, Alice texted Vikki to explain that Jack missed Joe and “Joe needs to come see him at 4.” CP0167. On December 3, Peter offered to facilitate a closed-captioned Zoom visit for Rebecca. CP0192-0193. That same day, Alice wrote to her siblings:

spend some time with Dad. ...avoiding him
because you are angry at us hurts him more than
anyone else. ...
Please visit Dad, Vikki. I know the kinds of things
you think of me and I really don't care. I tell him
every day that you love him. Every day. He
doesn't really believe it because he hasn't seen you
in so long. It is time to put your feelings aside and
do the right thing for him.

CP0190-0192. On December 5, Alice texted Vikki: “Please see if Joe can come now.” CP0169.

Alice and Peter's outreach was successful. The following people saw Jack on December 1-5:

- December 1-5: Alice and Peter;
- December 1, 3: Mary Mouwdy (CP0350);

- December 2: Janean Kelly and two witnesses to his will (CP0355);
- December 4: Joe and Vikki (CP0151);
- December 5: Rebecca, via Zoom (CP0193-0194);
- December 5: Joe (CP0051); and
- December 5: Three members of the Stillwell family, via Zoom. CP0345.

Additionally, two EMTs and a sheriff's deputy saw Jack on December 5. CP0203. No one who saw Jack told Alice or Peter that they thought Jack needed immediate medical attention.

The only person who claimed Jack needed immediate medical care was Vikki, on the afternoon of December 5.

Although she had not seen Jack that day, she called 911 after a debate with Alice over text concerning Jack's toileting.

CP0157-0159, 0169-0173. In the 911 call, she reported that

Alice and Peter were preventing people from seeing Jack.

CP0019, 0215, 0220; Appx. 001-011 (regarding "isolation").

U. December 1-5: The older children repeatedly expressed satisfaction with Alice and Peter’s care for Jack.

On December 1, Vikki thanked Alice for “Doing such a wonderful job staying with Dad.” CP0055. On December 3, when Alice reported the continued decline in Jack’s strength, Rebecca responded: “it is a relief to know that you are grateful to be there.” CP0192. Later that day, Peter wrote to Rebecca that the earliest Jack could be seen by a doctor was December 6 and discussed some thoughts on Jack’s care. Rebecca’s response was: “Great ideas.” CP0047.⁷

On December 4, Rebecca asked Alice for information about Jack’s urination. Alice provided it and Rebecca responded: “Great info thanks.” CP0177. On the evening of December 4, Rebecca also proposed that Jack, or his urine, be

⁷ While, in court, the older children faulted Alice and Peter for having Jack use diapers on December 5 (CP0404:22; VRP 21:2, 10), Vikki had told them “Adult diapers is good” on December 4 after Jack nearly fell on the way to the toilet. CP0174, 0178.

checked for a possible bladder infection. CP0175, 0184-0185. Neither Alice, nor Ms. Mouwdy had seen signs of a bladder infection. CP0351 ¶ 11; CP0176, 0184-0185. But Alice told Rebecca that Jack was going to see a doctor on Monday, December 6. Rebecca responded: “Wonderful.” CP0185. As of that text message, at 8:44 pm on December 4, no one was suggesting that Alice or Peter was denying Jack of any needed care.

On December 4, Rebecca even certified a guardianship petition that said Jack “felt ill for one day” on December 1, and described Jack as being in “extremely good health” and “in overall good health.” CP0012-0014; Appx. 029-034 (documents related to Jack’s health).

V. December 5, 2021: Hours after Joe stormed into the house yelling, Jack became shaky and Alice had him taken to the hospital.

On December 5, Joe arrived at Jack’s home at the same time as the EMTs who had been called by Vikki. CP0248, 0376. He was angry, noisy, and gesticulating. *Id.* Peter tried to

slow Joe down, so he would not disturb Jack, but Jack could hear Joe and his behavior was stressful for Jack. CP0248-0249, 0376-0377.

Within minutes of Joe's arrival, he entered Jack's room. CP0249, 0377. EMTs entered after him and spoke directly to Jack. CP0249, 0377. They did not note any illness or injury to Jack. CP0203. Joe took Jack to the toilet and then watched television with him for a while. CP0050. He testified that Jack did not want to go to the hospital and "it was obvious how much better he was feeling and looking" by the time Joe left. CP0051; Appx. 012-023 (collecting records of the EMT visit).

Later that night, Jack began shaking and Alice decided he should go to the emergency room rather than waiting for his appointment with Dr. Mendelsohn. CP0195, 0200. Alice called EMTs and requested that they transport Jack to the hospital. CP0195, 0200, 0213.

W. December 6: Rebecca Knew Jack was in the hospital but told the Court he would not receive medical attention unless a TRO was entered.

On December 6, at 7:35AM, well before Kitsap County Superior Court opened for business, Alice told Rebecca that Jack was in the hospital. CP0195. Nevertheless, that day Rebecca filed a VAPO petition supported by declaration from herself and Joe claiming that “the only way to ensure medical examination is through removal of Peter Buck from the home and allowing Jack Clearman to be examined by medical staff.” CP0007. Rebecca’s attorney’s time records show that she called St. Michaels, the hospital where Jack had been admitted, before she drove to court to file the VAPO petition. CP0439.

X. December 6: Rebecca falsely told the court that Alice and Peter had blocked EMTs from seeing Jack.

Rebecca’s VAPO petition told the Court that Alice and Peter had blocked EMTs from seeing her father on December 5. Rebecca, of course, was not a percipient witness. The EMTs’ report lists the “Protocol Used” as “Basic Life Support Routine Medical Care.” CP0203. The report also noted “No patient

complaints or injury/illness noted” and “Patient evaluated, No Treatment/Transport Required.” *Id.* The time log for the incident shows that EMTs arrived “On scene: 14:52:35” and were “At patient 14:54:000,” just a minute and a half after they arrived. CP0204. EMTs stayed for over 18 minutes before closing the call. *Id.* The 911 call log is consistent: Sheriff’s Deputy White noted a “slight verbal with patient’s son and caretaker, but otherwise no prob. clearing.” CP0219. Peter and Alice, who were present, explained that the EMTs entered Jack’s room and spoke with him to establish his competence and his wish to not go to the hospital. CP0249, 0377. Joe testified that when he first arrived, Peter physically prevented EMTs from entering his father’s bedroom. CP0050. But he also testified that during part of the time EMTs were in the house, he was on the phone with his sister Rebecca. CP0051. And there is no report of Peter blocking EMTs in the December 5 Poulsbo Fire Department report or the report from Deputy White. CP0050, 0203-0205, 0220. Nevertheless, Joe put his dramatic

claim about Peter in bold and underlined in his declaration.

CP0050. Joe's false report of Peter physically blocking EMTs was repeated by people who were not present. CP0019, 0148, 0165, 0396, 0541. This repeated false claim was pivotal to the final VAPO order. CP0806.

Y. Rebecca did not provide notice of the TRO to Jack or his attorney and objected to his attorney's appearance in the VAPO action.

Knowing that Jack was in the hospital, Rebecca's attorney instructed the Sheriff's office to serve the TRO on him at his home. CP0004; CP0163. This was, of course, unsuccessful. CP0163. Rebecca's attorney then told the Sheriff's office to cease efforts to serve Jack, saying she would serve him by process server. CP0163. There is no record that she did.

Even though Mr. Broughton had appeared weeks before as Jack's attorney to request Jack's estate planning documents from Mr. Roberts, Rebecca did not serve the TRO on him. CP0140. Nor was it provided to Janean Kelly, who Rebecca

knew had recently represented Jack. And when Mr. Broughton appeared for Jack in the VAPO action (CP0137-0141), Rebecca objected that Jack could not be represented by him. CP0147-0150.

Z. Jack suffered unconscionable consequences as a result of the older children's zeal to invalidate his will.

Jack died on December 9 in the hospital. He was denied his wish to end his life at home. CP0195 (even on December 6, Jack was asking to return home). The older children withheld 42 pages of the hospital records they submitted to the VAPO court. CP0780-0781 (pages jump from "8" to "51"). As a result, the record does not show whether Jack was stable enough to be transferred home; whether he asked for Alice, his companion of six years, to be with him; or whether he objected to the allegations against Alice and Peter. The last available document, from December 8, records hospital staff admonishing Rebecca for attempting to perform acupuncture on Jack in violation of hospital policy. CP0791. Also on December 8, Jack's treating doctor mentioned the possibility of hospice

and Rebecca told him that if Jack improved, she would want him sent to a facility. CP0784-0785.

The older children's legal maneuvering in the guardianship and VAPO petitions were aimed at invalidating Jack's estate planning documents. Appx. 043-053. But their immediate effect was to leave Jack alone at night for the first time in six years, in an unfamiliar hospital bed. CP0310, 0481. Alice pleaded with Vikki to spend the night with Jack, but she refused. *Id.* Those who knew Jack agree that being separated from Alice and his home would have been tragic for him. CP0345, 0355.

AA. After separating Alice from Jack, the older children continued to use the TRO to keep her out of her home and threaten her cats.

The older children had Alice served with the TRO when she stepped out of the hospital. CP0309. That caused Alice to be denied re-entry and cheated of any chance to say goodbye to her father. *Id.* She was given only fifteen minutes to vacate her home of six years. CP0310. The older children gave her no

updates on her father until December 10, when Rebecca's attorney flatly informed her that her father was dead, but the TRO still barred her from her home, and because she did not seem to want the she had to leave at her home, they would be sent to Animal Control where they would be put up for adoption after four days. CP0277, 0283. Alice's counsel promptly responded that the VAPO case was moot, and Alice should be allowed to return home to grieve and take care of her pets, which she of course intended to keep. CP0288.

Rebecca's attorney tried to use her control over Alice's access to her home and pets to extort litigation concessions:

Karen,

I think that if Alice agreed that she will not serve as Successor Trustee and PR and leave that duty to a professional fiduciary (leaving the decision about whether the amendment giving Alice the house was valid to another day), that would go a long way to calming the family and allowing her to go back in the house for an agreed period of time.

Let me know if you think this could even be *considered*.

Sara

CP0292. Alice's counsel responded: "There is no way I'm going to even consider this litigation blackmail." CP0488. But, three days later, Rebecca's attorney repeated that she would only "negotiate the terms of Alice returning to the house" if Alice first did what Rebecca wanted concerning Jack's estate. CP0490. Three days later, Vikki called Animal Control to report that she believed Alice had abandoned the cats, which then captured and impounded. CP0298, CP0300-0301 (photos of the cats after their capture).

BB. The older children vandalized and neglected the house in Alice's absence.

The TRO that was supposed to provide emergency protection for Jack kept Alice out of her home for 30 days *after* Jack died. CP0428. Alice returned to find the basement flooded by a faucet left on in her absence; locks fastened for which she had no key; garbage left in the garage where it had been scattered by rats; perishable food left to rot and stink in the refrigerator; Alice's bedroom tossed with the mattress off the

bed, a drawer removed, linens all over the floor; and mail left to soak in the rain. CP0481.

CC. The older children continued to pursue this case and the VAPO court continued to enter rulings after the case was moot.

The VAPO court held a hearing on January 7, 2022, to determine if a final VAPO order would be entered. CP0425.

Rebecca asked that the Court (1) order Alice and Peter to account for any use of Jack's assets; (2) prohibit Alice and Peter from handling Jack's estate's assets; and (3) prohibit Alice or Peter from serving as Personal Representative of Jack's estate. CP0406-0407. Rebecca did not seek any damages and no one appeared on behalf of Jack's estate.

The court denied the request for an accounting. CP0427-0430. The court knew that Rebecca had already initiated a probate action and that Peter and Alice had affirmatively requested that neither of them be appointed personal representative of Jack's estate and that a professional fiduciary be placed in that role. VRP 39; CP0420-0421. But instead of

ruling that the action was moot, the court entered an order finding that Alice and Peter had committed undue influence and neglect. CP0429.

Rebecca's attorney wrote the findings and conclusions contained in the VAPO court's January 7 Order. VRP 58. But days later, Rebecca moved for entry of additional findings and conclusions. CP0431. The court heard that motion on January 31. VRP 58. At that hearing, the Court decided that it would enter additional findings and conclusions, which it did on April 26, 2022. VRP 68; CP0798-0811.

Alice and Peter appeal from the January 7 and April 26 orders.

V. ARGUMENT

A. Standards of review.

1. The issue of mootness is reviewed *de novo*.

Mootness, like other questions of justiciability, is a question of law reviewed *de novo*. *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 203–

04, 293 P.3d 413 (2013); *Wolstein v. Yorkshire Ins. Co. Ltd.*, 97 Wn.App. 201, 206, 985 P.2d 400 (1999); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29, 891 P.2d 29 (1995).

2. VAPO orders are reviewed for abuse of discretion—it is an abuse of discretion to apply an incorrect legal standard or make a ruling which does not meet the correct evidentiary requirements.

An appellate court reviews a trial court's VAPO decision for abuse of discretion. *Winter v. Dep't of Soc. and Health Servs. on behalf of Winter*, 12 Wn.App.2d 815, 838, 460 P.3d 667 (2020). A trial court abuses its discretion if its ruling is manifestly unreasonable, exercised on untenable grounds or for untenable reasons, or if it is based on an erroneous view of the law or involves application of an incorrect legal analysis. *Id.* at 839; *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Wa. State Phys. Ins. Exch. & Ass'n v. Fisons, et al*, 122

Wn.2d 299, 339, 858 P.2d 1054 (1993). A trial court also abuses its discretion if the decision is “outside the range of acceptable choices, given the facts and the applicable legal standard; ... [or] it is based on an incorrect standard...”

Littlefield, 133 Wn.2d at 47. To survive review, a trial court’s findings in a VAPO order must be supported by substantial evidence. *In re Knight*, 178 Wn.App. 929, 937, 317 P.3d 1068 (2014).

3. Where the burden of proof is clear, cogent, and convincing evidence, the appellate court must review the findings for substantial evidence in light of the “highly probable” test.

When the vulnerable adult at issue objects to a VAPO petition, the petitioner must establish the need for a VAPO order by clear, cogent, and convincing evidence. *In re Knight*, 178 Wn.App. at 937. Here, Jack objected to the VAPO petition. CP0139. Rebecca recognized that “[t]he standard for the Court to apply is clear, cogent, and convincing evidence.” VRP 13 (Rebecca’s counsel arguing). The court did as well. CP0807 at COL 1.

“When a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, we incorporate that standard of proof in conducting substantial evidence review.” *Kitsap Bank v. Denley*, 177 Wn.App. 559, 569, 312 P.3d 711 (2013). Requiring clear, cogent, and convincing evidence is “the equivalent of saying that the ultimate fact in issue must be shown by evidence to be highly probable.” *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). When a finding made under the clear, cogent, and convincing standard is appealed, “the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the ‘highly probable’ test.” *Denley*, 177 Wn.App. at 569 (citing *In re Sego*, 82 Wn.2d at 739; *In re Estate of Riley*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970)(recognizing that “[e]vidence which is ‘substantial’ to support a preponderance may not be sufficient to support the clear, cogent, and convincing” standard)).

4. Undue influence is a mixed question of law and fact—factual findings are reviewed for substantial evidence, legal conclusions are reviewed *de novo*.

To enter a VAPO, the court must find that a vulnerable adult has been abandoned, abused, exploited, or neglected. *See* RCW 74.34.110(2). One form of “abuse” recognized by the statute is “personal exploitation,” which means “an act of forcing, compelling, or exerting undue influence over a vulnerable adult.” RCW 74.34.020(2)(d).

“The determination of undue influence presents a mixed question of fact and law.” *In re Melter*, 167 Wn.App. 285, 300–01, 273 P.3d 991 (2012). Courts review challenged findings of fact applying the clear, cogent, and convincing standard of proof, then review *de novo* whether the supported and uncontested findings (if any) support a legal conclusion that undue influence occurred. *Id.* Where the burden of proof is clear, cogent, and convincing, a trial court’s adverse view of a respondent’s credibility cannot satisfy the petitioner’s burden of proof. *Id.*, at 302. “Mere suspicion, even when accompanied by

opportunity and motive, is insufficient to raise a substantial inference of undue influence.” *Id.*, at 302-303 (*quoting In re Estate of Smith*, 68 Wn.2d 145, 157, 411 P.2d 879, *corrected by* 416 P.2d 124 (1966); *In re Estate of Hansen*, 66 Wn.2d 166, 172, 401 P.2d 866 (1965)). Indeed, “mere suspicion, unaccompanied by evidentially supported implicating circumstances” does not even give rise to a rebuttable presumption of undue influence. *Id.* (*quoting Smith*, 68 Wn.2d at 157); *Hansen*, 66 Wn.2d at 172.

B. The VAPO court erred by entering orders in this case on January 7 and April 26 because the case was moot.

1. It is error for the superior court to rule on a case that is moot.

When a case is moot at the time the superior court rules, the superior court’s ruling must be vacated. *Harbor Lands LP v. City of Blaine*, 146 Wn.App. 589, 595, 191 P.3d 1282 (2008). “A case is moot if a court can no longer provide effective relief.” *Id.*, at 592 (*quoting Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)).

The issue of mootness “is directed at the jurisdiction of the court.” *Id.* (quoting *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983)). As such, it “may be raised at any time.” *Id.* (quoting *Citizens*, 99 Wn.2d at 350). While in cases of particular public interest, an appellate court may rule on a moot issue, a trial court may not. *Orwick*, 103 Wn.2d at 253 (the public interest exception to the mootness doctrine only applies when a case becomes moot *after* a trial court reaches the merits of the case).

Where the same parties are engaged in multiple lawsuits, each suit has to be analyzed separately for mootness. *Harbor Lands*, 146 Wn.App. at 592-594. In *Harbor Lands*, a real estate developer sued the City of Blaine in superior court to overturn stop work orders and in federal court for related damages. While the suits were pending, the stop work orders were lifted. The developer and the city continued to litigate in the superior court, in the hope of obtaining a ruling that could be used for preclusive effect in the federal court. After the superior court

ruled in favor of the developer, the city appealed on mootness grounds.

The Court of Appeals determined that once the stop work orders had been lifted, “a decision in favor of [developer] would confer no additional benefit.” 146 Wn.App. at 592. The case was therefore moot and it had been error for the superior court to rule. The fact that the superior court’s ruling might have had a preclusive effect in the federal court action did not prevent the superior court action itself from being moot. *Id.* at 593. The developer’s position that the superior court was right to rule on the merits because of its ruling’s potential preclusive effect amounted to “nothing more than a request that we issue a purely advisory opinion, instructing another court how to rule.” *Id.* In fact, the parties’ tactic of continuing to litigate despite the mootness of the case was “a misuse of the state court system and an abuse of the citizens whose tax payments fund our courts.” *Id.* at 593-594.

2. It was error for the court to rule on this case on January 7 and thereafter because there was no prospect of any effective relief.

The purpose of a VAPO proceeding is to protect a vulnerable adult. *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 749, 110 P.3d 796 (2005)(“chapter 74.34 RCW, was enacted in 1995 to provide protection and legal remedies to vulnerable adults”); *In re Knight*, 178 Wn.App. at 937(RCW 74.34 is “concerned with the person and financial health of vulnerable adults.”). The purpose of a VAPO proceeding is not to settle a dispute between siblings. *Matter of Bosone*, 8 Wn. App. 2d 1003, 2019 WL 1258927 (2019)(trial court properly dismissed VAPO proceedings in favor of a guardianship proceeding even though guardianship would not allow one sibling to advance claims against the other.).⁸ In a VAPO proceeding, the only appropriate relief is that which is “necessary for the protection of the vulnerable adult” against

⁸ All unpublished cases are identified and are cited for their persuasive authority, per CR 14(a).

“abandonment, abuse, financial exploitation, or neglect, or the threat thereof.” RCW 74.34.110(1) and.130.

Here, Rebecca’s VAPO petition sought three forms of relief: physical separation of Alice and Peter from Jack; an accounting; and an order preventing Alice and Peter from handling Jack’s assets. CP0003. The court should have denied all these requests for relief as moot.

After Jack died, the VAPO court had no ability to enter any effective relief related to Jack’s person. Hence, the question of whether Alice or Peter had neglected his health was moot. It was error for the court to rule on the question of neglect. The court even seemed to realize it had no capacity to enter any relief. As soon as it orally ruled that neglect had been committed, it commented: “As to remedies, one thing that I do agree with Mr. Lovejoy and Ms. Bertram on is this is now going to become a probate matter.” VRP 53.

As of January 7, the request for an order preventing Alice and Peter from handling Jack’s assets was also moot. The

VAPo court knew that Rebecca, Alice, and Peter, had all declined to serve as personal representative of Jack's estate and requested that the probate court appoint a third-party professional. On January 6, 2022, Alice filed a counterpetition to probate Jack's 2021 will. CP0412, 0420 (providing the VAPo court on January 6 with Alice's probate filings); VRP 39 (informing the VAPo court on January 7 that Peter joined in Alice's request for the appointment of a third-party professional). As of that point, Rebecca's request that the VAPo court order Alice and Peter not to handle Jack's assets was moot because Jack's assets were under the control of the probate court, which would be appointing a professional to represent the estate.

As of January 7, the court had denied the request for an accounting and there was no means for it to effectively provide either of the other forms of relief requested in the VAPo petition. This is demonstrated by the relief the court did attempt to provide.

First, the VAPO court ordered that Alice and Peter could return home unless and until the probate court or probate court-appointed fiduciary determined otherwise. CP0809 ¶ 2. As the probate court did not need the VAPO court's permission to make its own rulings about Alice and Peter's presence in the home, and Alice and Peter could have returned if the VAPO court had simply declared the VAPO action moot, the VAPO court's order did not provide any effective relief.

Second, the VAPO court ordered that Alice and Peter could not destroy, sell, remove or donate any items belonging to Jack's estate. *Id.* ¶ 3. This was unnecessary and of no practical effect as the probate court was already overseeing Jack's estate.

Third, the VAPO court ordered Alice and Peter to not use the joint bank account Jack had set up with Alice and (in a modification of its oral ruling) ordered Alice and Peter to provide an accounting to the probate court. *Id.* ¶ 4. The VAPO court knew that the account in question was already frozen

(VRP 55:16-18) and under the supervision of the probate court. And the VAPO court had no jurisdiction to order any party to do anything in the probate action. So, this part of the VAPO court's order was also of no practical effect.

Fourth and finally, the Court prohibited Alice and Peter from recording any deeds to any real property in the name of Jack or his estate. CP0809 ¶ 5. Again, there was no possibility of either of them doing so as they had affirmatively disclaimed any right to represent Jack's estate.

In the absence of any need or ability to provide relief, the case was entirely moot. *Harbor Lands*, 146 Wn.App. at 592.

The fact that Rebecca may have desired an order from the VAPO court that she could use to try to persuade or preclude the Probate court did not prevent this matter from being moot. *Id.* at 593-594. In fact, the potential that Rebecca might use the VAPO court's ruling on moot issues for preclusive effect in the probate action requires this Court to vacate that ruling. *Id.* at 595.

Vacating the VAPO order is not only the legally correct course, it is also necessary to avoid the ongoing injustice caused by the VAPO court's decision to exceed its jurisdiction. Alice and Peter are currently registered abusers as a result of the VAPO. CP0430. This registration is permanent, unfairly damaging to Alice and Peter's reputations, and precludes them from many work and volunteering opportunities. RCW 74.39A.056(2).

3. Jurisdiction over VAPO petitions does not automatically continue after death, but continues only as to limited circumstances and persons, which are not present here.

Below, in response to Alice and Peter's arguments about mootness, Rebecca argued that a VAPO court does not lose jurisdiction over a case just because the vulnerable adult dies. CP0397. While RCW 74.34 provides a narrow procedure for a

VAPO action to continue after the vulnerable adult's death, that procedure does not apply here.⁹

RCW 74.34.200 provided that a vulnerable adult subjected to abuse while “residing in a facility” or while receiving in home care from “a home health, hospice, or home care agency, or an individual provider” shall have a cause of action for damages against the defined, licensed persons.

Section .210 provided

The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries. (Emphasis added.)

Section .210 left the decision of whether to maintain a VAPO petition post-death “to the discretion of the estate’s personal representative.” *Matter of Est. of Titus*, 14 Wn.App.2d 1032, n.

⁹ All discussion of RCW 74.34 will focus on RCW 74.34 as it existed before July 1, 2022, when it was amended. See Appx. 129-147.

8, 2020 WL 5511331 *5 (2020)(unpublished). Per the text of the statute: if the personal representative decided to maintain the action post-death, it had to *petition* the Court to do so. And if someone else initiated the action before death, the right to maintain the action transferred away from that person and exclusively to the personal representative. Finally, as the status provides, a post-death VAPO action is only maintained for the purpose of recovering damages against defined licensed persons.

Here, Section .210 did not allow Rebecca's VAPO petition to survive Jack's death for many reasons. There was no request for damages in the VAPO petition. Neither Alice nor Peter was a proper defendant for a damages action under RCW 74.34.200 because neither was a home health, hospice, home care agency, or individual provider, as they had no contract with the Department of Social and Health Services. RCW 74.34.020(11). There was no petition made to continue the VAPO proceeding after Jack's death. Jack's estate's personal

representative never appeared in the VAPO action. And any right Rebecca had to maintain the action transferred to the personal representative upon Jack's death. The case was moot under the plain language of RCW 74.34 at the time of the January 7 and April 26 orders, which must therefore be vacated.

C. Undue influence is tantamount to force or fear that destroys free will.

RCW 74.34.020(2)(d) protects against “undue influence” that “caus[es] the vulnerable adult to act in a way that is inconsistent with relevant past behavior,” but it does not define the term “undue influence.” This Court and Division I have analyzed claims of undue influence under RCW 74.34 using the standard for undue influence developed in will contests in three unpublished cases. *In re Est. of Johnson*, 4 Wn.App.2d 1038, 2018 WL 3344944 (2018); *Matter of Guardianship of Horst*, 20 Wn.App.2d 1050, 2022 WL 167494 (2022); *Matter of Est. of Besola*, --- Wn.App.2d ---2022 WL 2467468 (2022).

Not all influence is undue influence. Undue influence is that which, at the time of the testamentary or other relevant act,

“interfered with the free will of the testator and prevented the exercise of judgment and choice.” *In re Melter*, 167 Wn.App. at 306 (quoting *In re Riley’s Estate*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970)). Undue influence is “tantamount to force or fear which destroys the testator’s free agency and constrains him to do what is against his will.” *Id.* at 306-307 (quoting *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998)). “Actions such as ‘giving advice, arguments, persuasions, solicitations, suggestions or entreaties’ generally do not amount to undue influence unless such actions are so importunate, persistent, or coercive that they effectively subdue and subordinate the will of the testator and take away his or her freedom of action.” *Id.* at 307 (citing *In re Estate of Marks*, 91 Wn.App. 325, 333, 957 P.2d 235, *review denied*, 136 Wn.2d 1031, 972 P.2d 466 (1998)). Courts do not treat advice and persuasion as undue influence because of the “very real risk” that doing so would “frustrat[e] the testator’s right to dispose of [their] property.” *Id.* at 313.

In re Melter, 167 Wn.App. 285, illustrates the difference between permissible involvement and undue influence. There, John stood in a confidential relationship with his mother, Virginia. John facilitated her hiring of a lawyer, Pamela Rohr, made the appointment with Rohr, drove Virginia to Rohr's office, and received virtually all of Virginia's estate in the will written by Rohr. *Id.* at 307. The Court of Appeals reversed the trial court finding of undue influence because the evidence "[fell] short of key elements commonly found in decisions recognizing undue influence." *Id.* at 308-309. There was no evidence that John secluded Virginia, limited the funds she had to live on, monitored her communications with relatives, or refused to allow her contact with others. *Id.* at 308-309. "Whether or not the proponent of a will isolated the testator from others has been identified as important evidence bearing on undue influence." *Id.* William, John's brother who challenged Virginia's will, admitted that he remained in contact with his mother. The Court also noted that unlike in cases that

have found undue influence, John was not present when his mother discussed the terms of her will with her attorney or at its execution. “He did little more than schedule the appointment and drive her to [the attorney’s] office.” *Id.* at 309. Finally, the court noted that Virginia had testamentary capacity when she signed her will and “a testator’s strength of mind is obviously important evidence, bearing directly on the prospect that his or her free will was overcome, and is often noted when declining to find undue influence.” *Id.* at 310.

As *Melter* recognized, a finding of undue influence must be supported by more than a petitioner’s suspicion or evidence of an opportunity to exert undue influence. This principle is well-recognized, including in the seminal case on undue influence in Washington, *Dean v. Jordan*, 194 Wn. 661, 79 P.2d 331 (1938). In *Dean*, the testator was elderly, infirm, and had previously been declared insane for a time. The proponent of her will, a niece, was in a confidential relationship with her, had the opportunity to unduly influence her, participated in

procuring the will, and was substituted in the will for other relatives as the sole beneficiary. But there was no positive evidence of undue influence. And there was evidence that the testator understood what she was doing and appreciated the support she had received from the niece. Under these circumstances, there was no undue influence. *Id.* at 673-674; *see also Denley*, 177 Wn.App. at 570(the fact that Lanterno, a bank employee, facilitated Correll's deposit of \$400,000 into an account for which Correll then designated Lanterno beneficiary, did not support a finding of undue influence where Lanterno was not directly involved in the change in beneficiary designation.).

D. The Court erred in concluding that Alice and Peter exercised undue influence.

1. The predicate findings for the VAPO court's determination of undue influence are not supported by clear, cogent, and convincing evidence.

The VAPO court concluded

Alice and Peter exerted undue influence by deceiving Jack and leading him to believe that

Vikki and Rebecca intended to sell his house and put him in an institution. These false statements were used to persuade Jack to change his estate plan, Will and Trust documents as well as his powers of attorney.

CP0807, COL 4. The factual predicates for COL 4, which the VAPO court stated within Conclusion 4, in its oral ruling, and in its Findings, were not supported by clear, cogent, and convincing evidence.

a. There is no evidence that Alice and Peter did anything for the purpose of persuading Jack to change his estate plan.

There is no evidence of Alice or Peter ever discussing any change to Jack's estate plan or powers of attorney with him. There is no evidence of any solicitation, pressuring, or attempt to persuade Jack by Alice or Peter. The finding that Alice and Peter acted with the intent to change Jack's estate plan is speculative.

b. There is no evidence Alice or Peter deceived Jack.

Rebecca and Vikki themselves talked to Jack about how he was supposedly running out of money and would need to sell

his house. CP0305. And Jack learned from Ms. Kelly, not Alice or Peter, that Vikki had him sign away the deed to his house. CP0144.

Vikki testified that when she had Jack confined in her car she “confirmed then that Alice and Peter were filling his head with lies.” CP0540. But she did not explain what she heard that was not true or provide any other explanation for her self-serving conclusion.

In its oral findings, the Court found that there was no evidence that anyone but Alice and Peter told Jack that Rebecca and Vikki intended to sell Jack’s home and move him to an institution. VRP 50. But Alice testified, without any rebuttal, that Rebecca herself “told Dad he was running out of money and it would be too expensive to keep him at home and that she was there to sell his house. Vikki said the same.” CP0305 ¶ 7. Rebecca’s email to Alice and Peter also says: “Dad no longer has funds to pay for in-home care,” “we must have a new plan,” “Dad will do extremely well in an environment with lots more

people,” and “this is my decision to make.” CP0028. Far from lying about Rebecca’s intentions, Alice and Peter showed the email itself to Jack. CP0031.

FOF 11, which says Alice emailed Vikki to say that Alice and Peter had told Jack that Rebecca planned to sell Jack’s house and put him in a facility is wrong. Alice’s email says: “We showed Dad the October 4 email from Rebecca... She made it clear when she arrived that she planned to sell the house and move Dad into an institutional care facility.” CP0031.

FOF 12 says Rebecca’s October 29 email demands that Alice and Peter “stop telling Jack that she is going to sell his house and put him in an institution.” It does not say that. It says Rebecca is fatigued with Alice and Peter’s alleged “mischaracterization” of their meeting with her. CP0032. But it never says or implies that they made any misstatements or mischaracterizations to Jack. There is no evidence of them ever telling Jack anything Rebecca did not herself write down. The Court also found that Rebecca offered to have Jack move in

with her “among other options.” In fact, there was only one other option proposed in Rebecca’s email: “a senior living apartment.” CP0032. There is no record that Rebecca ever presented Jack with any options other than sale of his house and a facility, that Rebecca ever did anything to assuage his fear after she told him of her “new plan” to sell his home, or that Alice or Peter caused Jack to disbelieve Rebecca.

c. There was no “plan to consider all options.”

The VAPO court found that Rebecca wrote to Alice and Peter on October 4 “suggesting they consider all options due to the projected cost of \$147,000 per year for hiring in-home care.” CP0802, FOF 10. Rebecca’s email did not suggest that Alice and Peter consider anything. She *told* Alice and Peter that she was making a decision (“this is my decision to make”) and they were going to have to “adjust” to it. CP0028. Rebecca did

not even say that *she* was “considering all options.” She said in-home care was not an option because it was too expensive.¹⁰

d. Alice and Peter did not instruct Jack to transfer funds.

The trial court found that “Alice and Peter took Jack to Kitsap Bank and had Jack transfer \$46,000 out of the account managed by Vikki for Jack’s bills and deposited those funds into a joint account Jack created with Alice.” CP0802, FOF 14. Mary Taylor provided the only evidence from Kitsap Bank. She merely said “Jack set up a new joint account with Alice Clearman and transferred most of the money, \$46,000, into that account. Jack left his joint account with Vikki Clearman open.” CP0229. No evidence suggested that Alice or Peter directed Jack to transfer funds.

¹⁰ The VAPO court’s findings did not recognize that Rebecca mischaracterized Peter’s modest in-home care proposal. He suggested 68 hours per month at a cost of \$36-\$38 per hour and he offered to help pay for it. CP0027, 0032. That plan would not have cost the “\$13,000+ per month” figure stated in Rebecca’s response. CP0028.

e. Peter did not tell Vikki that being upset is elder abuse.

The court found that Peter sent an email to Vikki that says she was committing elder abuse by “being upset with Jack.” CP0803, FOF 15. Again, the VAPO court plainly misread a document in a way that unfairly disfavors Alice and Peter. Peter’s email actually says it was elder abuse for Vikki to become very angry with Jack when he said he intended to leave his house to Alice, threaten to never speak to him again, and carry out that threat—all of which happened after Joe removed Jack from his home under false pretenses and delivered him to Vikki. CP0034. The VAPO court’s finding is particularly troubling because in choosing to belittle Peter, the VAPO court missed the fact that Peter was correct in his assessment of Vikki’s actions. RCW 74.34.020(2)(“abuse” means “willful action...that inflicts...intimidation or punishment on a vulnerable adult”)(2)(a)(“mental abuse means a willful verbal...action that threatens...coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult.”).

f. Alice and Peter did not take Jack to a new attorney.

The trial court found that “Alice and Peter took Jack to a new attorney.” CP0804, FOF 19. This finding is wrong and could only have been reached by relying on inadmissible speculation from Vikki and Rebecca, rather than first-hand testimony from Ms. Kelly, Peter, and Alice, who all confirmed that Ms. Kelly came to Jack and met with him privately. This error is significant because the phrasing and context of Finding 19 suggests that the VAPO court saw the fictitious “taking” of Jack as proof of coercion.

2. The actual facts do not support a conclusion of undue influence.

The speculative nature of the VAPO court’s finding of undue influence is underscored by one of its oral findings, which was incorporated in the April 26 order. CP0807, FOF 34. The court found that Jack changed accountants as the result of personal exploitation. VRP 51. The court’s reasoning was: “I don’t understand why he would do that, unless he was being

influenced by comments of the other parties, so I am finding personal exploitation.” It was error to make a finding on such admittedly speculative grounds. Additionally, the evidence showed that a bookkeeper was needed because Vikki, who had been paying Jack’s bills, wasn’t talking to him. CP0306, 0564.¹¹

If Alice and Peter had acted like Alice’s siblings, there may have been sufficient evidence of undue influence. For instance, if they had hired an attorney without Jack knowing it and instructed the attorney on what to put in Jack’s estate planning documents, like the other siblings did with David Roberts, that could have been undue influence. *See In re Estate of Haviland*, 162 Wn.App. 548, 555-556, 255 P.3d 854 (2011)(decedent’s wife advised decedent’s attorney about

¹¹ FOF 16 found that Peter’s November 5 email stated that “Alice had hired a new accountant for Jack without any consultation with Vikki or any other family members.” The email does not say that anyone had already been hired and the email itself is a consultation with the family. CP0035.

changes to make to his will and accompanied decedent to signing). If Alice and Peter had taken Jack to an isolated location and presented him with documents to sign, like Vikki and Joe did, that could have been evidence of undue influence. *Lint*, 135 Wn.2d at 535. Or if they had yelled at Jack and threatened to never speak to him again if he did not do what they wanted, like Vikki did, that could have been undue influence. RCW 74.34.020(2) and (2)(c); *In re Melter*, 167 Wn.2d at 308-309. But there is no evidence of Alice or Peter doing any of that.

E. The VAPO court erred in concluding that Alice and Peter committed neglect.

1. A finding of neglect requires clear, cogent, and convincing evidence of a duty, a “serious disregard of consequences” and a “clear and present danger.”

Under RCW 74.34.020(16), “neglect” is (a) a pattern of conduct or inaction by a person with a duty of care that fails to provide goods and services necessary to a vulnerable adult’s health or (b) “an act or omission by a person ... with a duty of

care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety.”

The court did not find any “pattern” of neglect, nor could it have, as Alice’s pattern of care for Jack over a six-year period was universally admired. Instead, the court relied on Section .020(16)(b). To support a finding of neglect under that section, a petitioner must prove “(1) a person or entity with a duty of care (2) to a vulnerable adult (3) committed an act or omission (4) demonstrating a serious disregard of consequences (5) of such a magnitude to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety.” *Gates v. Dep't of Soc. & Health Servs.*, 20 Wn.App.2d 1080, 2022 WL 456177 (2022)(unpublished).

2. Neglect requires misconduct worse than negligence.

“[S]erious disregard requires more than simple negligence.” *Woldemicael v. DSHS*, 19 Wn.App.2d 178, 182,

494 P.3d 1100 (2021). It is the same as “reckless disregard,” which our Supreme Court has defined as an intentional act or failure to do an act that it is one’s duty to another to do, knowing or having reason to know of “facts that would lead a reasonable person to realize that the actor’s conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him or her.” *Brown v. DSHS*, 190 Wn.App. 572, 590, 360 P.3d 875 (2015)(decided under the nearly identical language of the Abuse of Children Act, RCW 26.44)(citing *Adkisson v. City of Seattle*, 42 Wn.2d 676, 685, 258 P.2d 461 (1953)). Likewise, the phrase “clear and present danger...suggests more serious misconduct than mere negligence.” *Id.* at 591.

Raven, 177 Wn.2d 804, illustrates the difference between “neglect” under RCW 74.34 and “negligence.” There, a guardian kept her ward at home, rather than sending her to the hospital, despite her lack of cooperation with caregivers and

self-neglect at home. 177 Wn.2d at 809. The ward developed bed sores that required emergency intervention and hospitalization and, although the ward stabilized at the treatment center, she died shortly thereafter. *Id.* at 814-815. Substantial evidence supported the finding that Raven breached her duty of care and made “several professional missteps.” *Id.* at 829-31. Nevertheless, the Supreme Court unanimously reversed the neglect finding, holding that a guardian's good-faith determination to provide home treatment to a ward who opposed nursing home placement cannot be the basis for a finding of neglect. *Id.* at 822, 834.

In so holding, the Court cited “the legislature’s clear mandate against placing incapacitated persons against their will.” *Id.* at 817. The Court was not persuaded by the fact that the ward’s fear of institutions might have been based on conspiratorial “delusions.” *Id.* at 819-20. The Court reasoned that Washington law prevents any person, whether competent or not, from being placed against their will in a residential

treatment facility unless they have been involuntary committed under chapters 10.77m 71.05, and 72.23 RCW.” *Id.* at 821 (citing RCW 11.92.190). The Court further found that “[t]here was nothing inherently inappropriate” about in-home care, and noted that there were periods with bedsores and periods without bedsores, which suggested the home care arrangement was working. *Id.* at 826.

Similarly, there is evidence that Jack, who was not delusional or incapacitated, did not want to go to the hospital, even on the afternoon of December 5, and that he enjoyed long periods of very good health in Alice’s care at home. Even if Alice and Peter could be held to the standard of a professional guardian like Raven, there would be insufficient evidence for a finding of statutory neglect.

3. The Court had no legal basis for its conclusion that Alice and Peter owed Jack a duty.

Whether a duty exists is a question of law we review de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006)). The VAPO petition says nothing about the duty or

source of the alleged duty owed by either respondent. CP0001-7. Neither does the brief filed by Rebecca before the January 7 hearing. CP0391-0407.

The VAPO court's written findings included the legal conclusion that Alice and Peter owed Jack a duty of care because "they promised to provide care to Jack, lived in his home, and were to arrange for his daily care and needs." CP0808. The finding that Jack and Alice "promised to provide care" is not based on any evidence. There is no promise in the record. And if there were such a promise, there is no authority that makes a gratuitous promise to care for someone a legally cognizable duty. There was also no authority cited by Rebecca or the court for the conclusion that living in someone's home creates a legally enforceable duty of care. And the court's conclusion that Alice and Peter "were to arrange for" Jack's daily care and needs is so vague as to be meaningless. Alice did in fact care for Jack around the clock for years and Peter did in fact help Alice for a few months. But Alice did that because she

is a loving daughter and Peter did so out of affection for Alice and Jack. The court's conclusion that they were bound by a legal duty was wrong. Absent a legal duty, the VAPO court erred in concluding that they committed neglect.

4. A finding of “clear and present danger” cannot be based on hindsight.

Hindsight analysis is inappropriate when analyzing whether there is a clear and present danger under RCW 74.34.020. *Brown*, 190 Wn.App. at 596; *In re Dep. of Lee*, 200 Wn.App. 414, 438, 404 P.3d 575 (2017)(trial court erred in relying on hindsight to conclude that parents' rejection of a feeding tube for medically complex son constituted neglect); *see also Woldemicael*, 19 Wn.App.2d 178; *Pal v. State*, 7 Wn.App.2d 1065, 2019 WL 1048268 *10-11 (2019)(unpublished).

In *Pal*, a professional care giver allowed her charge, a developmentally disabled adult, to handle his own medication, which led to his overdosing and emergency hospital care. The Department of Social and Health Services (“DSHS”)

determined that the care giver had committed neglect. The Court of Appeals reversed. Before the overdose happened, there was nothing in the patient's history to make an overdose foreseeable. Hence, there was no reason to conclude that the care giver should have perceived a clear and present danger.. 2019 WL 1048268 at *10. Use of hindsight was error, as it is here.

Similarly, in *Woldemicael*, 19 Wn.App.2d 178, a licensed care provider failed to monitor the patient for choking while eating as described in the patient's individual support plan, then failed to respond correctly when the patient choked. DSHS determined that the care provider had committed neglect, but the Court of Appeals reversed. The Court refused to "view the question...through the clarity of hindsight." 19 Wn.App.2d at ¶ 83 (this portion unpublished). "And a tragic outcome cannot mandate a neglect finding." *Id.* (citing *Crosswhite v. Dep't of Social and Health Services*, 197 Wn.App. 539, 556, 389 P.3d 731 (2017)). The Court noted that the patient had handled food

that was not cut into bite-sized pieces for three years. And there was no evidence that the caregiver acted out of disregard for the consequences.

5. There is no evidence of a “serious disregard” for Jack’s well-being.

There is nothing in the record indicating that Alice or Peter decided to take or forgo any action because they did not care about the consequences for Jack. Instead, the evidence shows that they worked very hard to care for Jack, tried hard to find in-home and medical care for him, and called EMTs when he developed a treatable symptom. Below, Rebecca complained that Alice and Peter did not carry Jack to the bathroom and use a lift to get him on the toilet during December 1-5. The evidence is clear that Alice and Peter did not do that because Jack had injured himself in that process and they did not want him to injure himself again. CP0157-0159, 0169-0173. Rebecca and the VAPO court concluded that Alice and Peter had Jack taken to the hospital in the evening of December 5, rather than the afternoon, out of serious disregard for his health. But the

evidence shows that Alice and Peter made extensive efforts to get care for Jack appropriate to his condition (which appeared to be general decline due to weakness caused by injury) and took him to the hospital when he developed a treatable symptom. The evidence further shows that no one who saw Jack thought he needed more immediate care. And Jack himself did not go to the hospital on the afternoon of December 5. CP0051.

6. Without hindsight, no evidence suggests a clear and present danger.

The court attempted to identify a neglectful “act or omission” by Alice and Peter several times. First, the court said the act was “failing to obtain health care for Jack when he appeared ill (especially when he appeared ill enough to Alice and Peter that they felt they needed to send an “end of life” email to Jack’s other children).” CP0808. The VAPO court went on to say that “Alice and Peter did not obtain medical care for Jack in a timely manner to address symptoms that they themselves in their email and text communication identified as

serious.” CP0808. The VAPO court says their communications indicated that they believed Jack was “seriously ill” on December 1 or before. The Court then blames Alice and Peter for Jack’s death from a UTI. In its oral rulings, the VAPO court explicitly found that Jack’s UTI could have been prevented. VRP 52:24. There is no medical opinion or other evidence in the record to support that finding. Given that neither Ms. Mouwdy nor Alice saw signs of a UTI, the evidence suggests the infection advanced quickly.

The court misread the evidence and evaluated Alice and Peter based on hindsight knowledge of Jack’s death. And it was only through this misreading and faulty analysis that the court was able to find a clear and present danger.

During December 1-5, Peter and Alice said Jack was weak and had lost strength and energy due to a lack of mobility from a fall he had taken days before. Being a 100-year-old man who is declining from loss of mobility is very different from being a person with a treatable illness. Even the VAPO petition

itself, which was filed on December 6, recognizes the difference: “Jack Clearman is 100 years old. His condition is frail but healthy.” CP0007. In the case of a decline due to old age, a doctor cannot medicate a person back to youth. The record shows that Alice and Peter did not believe or have reason to believe Jack was ill. CP0351 ¶ 11; CP0176, 0184-0185. The court’s determination that Jack should have been taken to a doctor sooner is based on hindsight knowledge that he did become ill, not on the information available to Alice and Peter on December 1-5, which was that Jack was old and weakening.

The court also concluded that Alice and Peter committed neglect by “preventing emergency medical staff from examining Jack on the afternoon of December 5, 2021, when Joe was requesting a welfare check based upon their email and text to his wife.” CP0808. As discussed above, the finding that Alice and Peter prevented emergency medical staff from examining Jack is not correct and is not supported by clear,

cogent, and convincing evidence. So, it cannot support the court's legal conclusion. But even if Alice and Peter had blocked the EMTs, the court's conclusion would still not be supported by sufficient factual findings. For an act to constitute neglect, it must demonstrate a serious disregard of consequences of such a magnitude to constitute a clear and present danger. There is no evidence that on the afternoon of December 5 there was a clear and present danger facing Jack. The fact that the call was placed is not evidence of an emergency, it is evidence that Vikki wanted to get Alice and Peter in trouble. Vikki made the call anonymously. She had not seen Jack that day. She falsely claimed Alice and Peter were isolating him. Neither the EMTs, nor the sheriff's deputy, noted any signs of any clear and present danger. Joe arrived at the same time as the EMTs and stayed for over an hour and he did not mention any signs of a clear and present danger. The court's conclusion that on the afternoon of December 5 there was a danger that was clear and present to, but disregarded by, Alice

and Peter is not only unsupported by, but contrary to the evidence.

The court's conclusion that there was a danger that was "clear and present" on the afternoon of December 5 appears to be based not on any evidence of Jack's condition or appearance at that time but on a hindsight analysis—because he died days later, he must have appeared to be in danger on December 5. But on December 5 Jack was lucid, spoke to Joe, and told Joe he did not want to go to the hospital. CP0051. Even Joe, who supported the VAPO petition, did not perceive any clear and present danger. He said "it was obvious how much better [Jack] was feeling and looking." CP0051.

7. Alice did follow through with requests to have a medical assessment.

The VAPO court found that Alice and Peter did not "follow through with the request from the family to get a medical assessment or call for emergency services." CP0805. This finding is wrong. The "family" referred to by the VAPO court is Rebecca, Vikki, and Joe. The only times Rebecca

mentioned having Jack, or Jack's urine, medically evaluated were at 9:11pm, December 1, and in three text messages between 5:50pm and 8:37pm on December 4. CP0175, 0184-0185. On December 1, Rebecca said she assumed Alice would take Jack to the doctor on December 2 "if he's still sleepy/droopy." CP0045. The next day, Jack was much improved and Rebecca did not request that he go to the doctor, she asked that his appointment to be evaluated for hospice care be cancelled. CP0186-0187. On December 4, in response to Rebecca's text messages proposing that Jack be checked for a bladder infection, Alice responded that she had containers for urine samples and that Jack would see a doctor on Monday, December 6. CP0185. Rebecca responded: "Wonderful." *Id.* Rebecca spoke to Jack by Zoom on December 5 and did not request that he be seen by a doctor right away. CP0168, 0193-0194.

The only request by Vikki that Jack be evaluated was a suggestion in the course of a text exchange about toileting when

Vikki suggested that Alice call 911. CP0137, 0170-0172. Vikki then called 911 herself. CP0019, 0215. EMTs noted no patient complaint and Joe, who was there, noted that Jack did not want to go to the hospital and felt much better after using the toilet. CP0051. And ultimately, Alice had Jack transported to the hospital just hours after the EMTs first visit. CP0195, 0200, 0213.¹² Aside from Joe's histrionics when the EMTs arrived on the afternoon of December 5, which were shortly followed by his conclusion that Jack was doing better, there is no evidence that he ever requested a medical evaluation.

8. EMTs did see Jack and noted that he had no complaints.

The VAPO court found that Alice "refused to allow medical personnel to see Jack." CP0806. This finding was

¹² There was no finding, or evidentiary basis to find, that the difference of a few hours between Vikki's 911 call and Alice's 911 call was significant either to Jack's outcome or to the question of neglect. Nor is there an evidentiary basis for any such finding.

incorrect. EMTs did see and speak to Jack and noted that he had no complaints. CP0203.

The VAPO court also noted that a Poulsbo Fire record dated December 20, 2021, indicated that Poulsbo Fire did not “examine” Jack on December 5. CP0806. This finding is not supported. The December 20 document, submitted by Rebecca’s counsel, is not authenticated by anyone from Poulsbo Fire and is in an entirely different format than every other record produced by Poulsbo Fire in this matter. Additionally, it does not speak of “examining” Jack. It says “Medic 77 did not evaluate patient.” CP0259. This is significant because the contemporaneous record of the visit to Jack’s house says the opposite: “Patient Evaluated, No Treatment/Transport Required.” CP0203. It also says “No Patient Complaint – No Complaints or injury/illness noted.” CP0203. The record dated 15 days after the events in question does not supply anything close to clear, cogent, and convincing evidence to support the

VAPO court's finding that Alice refused to allow medical personnel to even see Jack.

9. Scheduling a hospice evaluation was not neglect.

The VAPO court found that there was “no evidence that Jack had a terminal illness or met criteria for hospice at any time leading up to his death.” CP0806, FOF 31. The VAPO court then relied on the fact that Alice had scheduled Jack for a hospice evaluation in concluding that Alice and Peter committed neglect. CP0808, Conclusion 6, lines 13-14. However, there is no evidence that scheduling Jack for a hospice evaluation was neglectful. The one doctor who submitted testimony in this case “*approved* a hospice order consult” based on the fact that Jack was failing to thrive. CP0231-0232.

F. The Trial Court's Attorney Fees and Costs Award is Unsupported by Law.

On April 26, 2022, the trial court entered an award of attorney fees against Alice and Peter in the amount of

\$13,386.15, citing RCW 74.34.130(7) as the basis for its award. CP0809.

RCW 74.34.130(7) allows a court to require a respondent to “reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney’s fee,” “*as it deems necessary for the protection of the vulnerable adult.*”

(Emphasis added.) A court reviews *de novo* whether there is a legal basis for awarding attorney fees by statute. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

Because the trial court erred in entering VAPO orders against Alice and Peter, its award of attorney fees and costs against them was also in error.

In the alternative, because Jack had died by the time the court entered its award of attorney fees against Alice and Peter, the award was not “necessary for the protection of the vulnerable adult” as required by RCW 74.34.130(7). And tellingly, the trial court’s Findings of Fact and Conclusions of law lack any findings explaining why its award of attorney fees

was necessary to protect Jack. Because the award was not necessary to protect Jack, the trial court erred in granting it.

G. This Court should award attorney fees to Alice and Peter.

The record of the older children's pre-litigation conduct, their manipulation of Jack, their misstatements to a 911 operator and in testimony to this court, their treatment of Alice's home and pets, and their decision to continue pressing this case forward after Jack died, demonstrates that the VAPO action, particularly after Jack's death, was a misuse of the court system and was motivated by bad faith. *Harbor Lands*, 146 Wn.App. and 595. This Court can and should award Alice and Peter the attorney fees they incurred below and in this Court. *Dalton M., LLC v. North Cascade Trustee Services*, 20 Wn.App.2d 914, 504 P.3d 834 (2022).

VI. CONCLUSION

Alice and Peter respectfully request that this Court vacate the VAPO court's January 7 and April 26 orders as moot or, in the alternative, reverse the conclusions in those orders that

Alice and Peter engaged in undue influence and neglect as unsupported by the evidence.

This document contains 15,719 words, excluding the parts of the document exempted from the word count by RAP 18.17. This Court previously set a limit of 16,000 words for this document.

DATED October 14, 2022.

Respectfully submitted,

CORR CRONIN LLP

s/ Jack M. Lovejoy

Jack M. Lovejoy, WSBA No. 36962
1015 Fourth Avenue, Floor 10
Seattle, WA 98104-1001
Tel (206) 625-8600
Fax (206) 625-0900
jlovejoy@corrchronin.com

Attorney for Appellant Peter Buck

KHBB LAW PLLC

s/ Karen Bertram

Karen Bertram, WSBA No. 22051
Hoge Building, Suite 800
705 Second Avenue
Seattle, Washington 98104
Tel (206) 382-4414

Fax (206) 382-4412
kbertram@khbblaw.com

Attorney for Appellant Alice
Clearman

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the
foregoing Appellants' Opening Brief to be served on the
following in the manner indicated below:

Karen R. Bertram 705 Second Avenue, Suite 800 Seattle, WA 98104 (206) 382-4414 Phone (206) 382-4412 Fax kbertram@khbblaw.com	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Via U.S. Mail Via Court of Appeals E-Service Via Hand Delivery Via electronic mail
---	---	--

Kenneth W. Masters Shelby R. Frost Lemmel MASTERS LAW GROUP, P.L.L.C. Mail: 321 High School Road NE, D-3 #362 Office: 241 Madison Avenue North Bainbridge Island, WA 98110 (206) 780-5033 ken@appeal-law.com shelby@appeal-law.com	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Via U.S. Mail Via Court of Appeals E-Service Via Hand Delivery Via electronic mail
---	---	--

I declare under penalty of perjury under the laws of the
state of Washington that the foregoing is true and correct.

DATED this 14th day of October, 2022, at Seattle,
Washington.

s/ Wen Cruz
Wen Cruz

CFL LAW GROUP, LLP

October 14, 2022 - 3:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 57008-4
Appellate Court Case Title: Jack F. Clearman, Respondent v. Alice J. Clearman and Peter L. Buck, Appellants
Superior Court Case Number: 21-2-01831-7

The following documents have been uploaded:

- 570084_Briefs_20221014152536D2445537_2282.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20221014 Appellants Opening Brief.pdf
- 570084_Other_20221014152536D2445537_6908.pdf
This File Contains:
Other - APPENDIX
The Original File Name was 20221014 Appendix.pdf

A copy of the uploaded files will be sent to:

- kbertram@khbblaw.com
- ken@appeal-law.com
- nderbyshire@khbblaw.com
- paralegal@appeal-law.com
- shelby@appeal-law.com
- wcruz@corrchronin.com

Comments:

Sender Name: Jack Lovejoy - Email: jlovejoy@corrchronin.com

Address:

1001 4TH AVE STE 3900

SEATTLE, WA, 98154-1051

Phone: 206-812-0894

Note: The Filing Id is 20221014152536D2445537